—*No.* 5483—

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

—o—

JOSE GANDARA,
Plaintiff in Error

VS.

THE UNITED STATES OF AMERICA
Defendant in Error.

—o—

REPLY TO PLAINTIFF IN ERROR'S PETITION FOR REHEARING

—o—

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Defendant in error respectfully submits its reply to the petition for rehearing filed by plaintiff in error.

Before undertaking to answer the contentions raised by plaintiff in error it is desired to call to the Court's attention the fact that several new matters have been injected into this case for the first time. While we are well acquainted with the rule that mat-

ters of fundamental error may be raised at any time, we cannot help but feel that to raise the quesiton as to the construction of an indictment for the first time upon a petition for rehearing is improper and contrary to the settled principles of justice. As said in the case of Merriam v. Chicago & E. I. R. Co., 66 Fed. Reporter 663:

> "*** When the court has correctly decided the questions upon which its judgment has been invoked by the appellants, they cannot, as a matter of right, require the court to consider any other questions upon a petition for a rehearing. If such a practice were permitted the case might be presented in parcels, and the litigation would, in this manner, be needlessly protracted, and this principle applies with peculiar force where, as in the present case, counsel ask a rehearing to enable them to present the case upon a theory in conflict with the course of their original argument. Fuller v. Little, 61 Ill. 22; Yater v. Mullen, 24 Ind. 277; Brooks v. Harris, 42 Ind. 177,180. It is, by the well-settled principles of the law, too late to present a question for the first time on a petition for a rehearing, and, in consenting to consider that question in the present instance, we do mean to make an innovation which shall be regarded as a precedent in future cases * * *."

We will however, answer the contentions of plaintiff in error in the order raised in their petition.

I

The first contention raised in the petition is:

THAT UNDER THE INDICTMENT, PROPERLY CONSTRUCTED, THE ONLY ALLEGED CONSPIRATORS WERE PLAINTIFF IN ERPOR, BISHOP NAVARETTE, AND DEFENDANTS BORGARO AND VALENZUELA. BISHOP NAVARETTE WAS ACQUITTED, A NOLLE PROSEQUI WAS ENTERED AS TO BORGARO AND VALENZUELA, AND PLAINTIFF IN ERROR ALONE WAS CONVICTED. INDIVIDUALLY, HE COULD NOT HAVE COMMITTED THE CRIME OF CONSPIRACY.

Plaintiff in error has very ably presented his idea of how the indictment properly construed could not possibly have charged a conspiracy against him alone, as all of the other defendants were liberated and that the allegation that he "conspired with divers other persons to the grand jurors unknown" adds nothing because it is used in the part of the indictment wherein the charge is made in the wording of the statute.

In furtherance of this attempted construction of the indictment, plaintiff in error quotes that portion of the indictment appearing on page 5 of this petition for rehearing, and argues therefrom that the indictment, "charged that the defendants and the defendants alone, entered into the conspiracy * * *." We would direct the court's attention to the first three lines of such quotation reading: "that is

to say, THE SAID DEFENDANTS *did conspire* to set foot and provide and prepare the means for an enterprise * * *." This language read piece meal as suggested by plaintiff in error is not an allegation of confederation until reference is had to that part of the indictment which charges: "did knowingly, willfully, unlawfully, feloniously and corruptly conspire, combine, confederate and agree together and *with divers other persons*, whose names are to the grand jurors unknown * * *." Certainly it is impossible to say that the words "defendants did conspire" mean the defendants did conspire together or did conspire with others in the absence of any direct averment to that effect, and necessarily the pleader intended, and the defendant before his trial must have understood, that he, Gandara, was charged with having conspired with his co-defendants and with divers other persons to set on foot the enterprise specified in the indictment.

In support of his contentions the cases of Feder v. United States 257 Fed. 694 and State v. Jackson 7 S. C. 283 are relied upon.

The Feder case supra) does not support his contention for there the court said: "The indictment charges these two defendants only; contains no allegation that they were but part of a larger body of conspirators, not the usual averments, that they conspired and agreed not only with themselves, but

with '*other persons to the grand jurors unknown*'."

The Jackson case (supra) is the same effect.

It is also well settled that an indictment in the words of the statute is sufficient.

Rudner v. United States 281 Fed. 516.

Montoya v. United States 262 Fed. 759.

It is true beyond question that the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy. And in the case at bar there was, we earnestly contend, a union of minds. The union of minds in this case could have been between two different classes of persons named in the indictment. FIRST: The union of minds and conspiracy between Gandara and other divers persons to the grand jurors unknown. It is the settled rule by the weight of authority that where only one of any number of defendants is found guilty, the conviction will stand where there is evidence supporting an allegation of "other persons to the grand jurors unknown."

Donegan v. United States (CCA 2nd Circuit) 287 Fed. 641;

This rule is also supported in the case of United States v. Vannatta 278 Fed. 559 wherein the court said:

> "The defendant also objects by his demurrer to the indictment on the ground that but one

defendant is named, although Farrell is alleged to have been one of the conspirators. In the case of Feder v. United States, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370 (C. C. A. 2nd Circuit), it was expressly held that a charge of conspiracy might be tried against one defendant alone, if two persons were shown to have been concerned in the conspiracy. The court also held that, if one of two conspirators should be found not guilty of conspiring, the charge must fall as to both. But in that case the indictment alleged that two defendants conspired with each other, and there was no charge in any form that others were concerned in the conspiracy.

"In the case at bar, the indictment charged that others were concerned in the conspiracy, of whom Farrell alone is named, and Farrell is not made a defendant, for reasons known only to the grand jurors, or to the district attorney. A natural inference is that the government did not desire to arrest or arraign Farrell on the charge, perhaps with the idea of using him as a witness. But this does not affect the validity of the indictment. So long as the charge of conspiracy is an allegation that the defendant Vannatta, was conspiring with one or more other persons, the charge of conspiracy will lie against him alone."

This was in the district court and the question was raised on demurrer. The defendant Vannatta was convicted and raised the same question on appeal to the Circuit Court of Appeals, Second Circuit, in the case of Vannatta v. United States 289

Federal Reporter 424, where the conviction was upheld and affirmed, the rule of law approved, and the Feder case (supra) cited.

SECOND: The union of minds and conspiracy between Gandara and Esteban Borgaro, or between Gandara, Esteban Borgaro, and "the other persons to the grand jurors unknown."

Plaintiff in error contends that if all of the conspirators, excepting one, are either acquitted or released upon a nolle prosequi, the basis of the charge is removed and the remaining defendants cannot properly be convicted. In support of that rather broad rule of law the Feder case (supra) is cited. As heretofore mentioned the Feder case was a case in which two defendants only were charged and one only was convicted. In that case the court reviews the authorities and cites and distinguishes the case of Brown v. United States, 145 Federal, which held that the jury might well have convicted the one person ultimately held guilty for conspiracy, not with the defendant to whom a new trial was awarded but with the absent defendant named, and the persons to the grand jurors unknown. The Feder case refuses to follow the Brown case (supra) because of the fact that in the Feder case no persons to the grand jurors unknown were named in the indictment and because the conspiracy was reduced by the terms of the indictment to only two persons.

Plaintiff in error also contends that he was entitled to know of the nature of the charge against him, and that the indictment was faulty inasmuch as it failed to give him that information. If this contention is seriously pursued, it is perhaps a sufficient answer to state that it is too late for such a question to be raised for the first time upon petition for rehearing, when no motion, demurrer, bill of particulars or other pleading has been filed below.

However, assuming that this contention is now properly raised, we still contend that Gandara was informed of the nature of the crime with which he was changed and that not only was the offense charged in the language of the statute but was also explained in ten overt acts. An overt act, is of course one of the necessary elements to a conspiracy, and another purpose is to inform the defendants of the nature of the charge against them. Without setting out the indictment in full it is desired to call to the court's attention overt act ten (T.R. page 7) which is as follows:

> "And the Grand Jurors aforesaid, on their oath aforesaid, do further present:
>
> "That, in furtherance of said conspiracy, and to effect the object and purpose thereof, the said JOSE GANDARA, between May 1, and June 20, A. D. 1927, the exact date being to the Grand Jurors unknown, at a certain point near Tucson ,within said District of Arizona, did *arrange plan* with divers persons whose

names are to the Grand Jurors unknown for the organization of certain Yaqui Indians into an armed body and did then and there organize said Yaqui Indians into an armed body for the purpose of marching from the State of Arizona, within the United States of America, to the Republic of Mexico, with the intent then and there to make war upon the Government of the said Republic of Mexico, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States ofAmerica."

Can it then be seriously contended that the indictment properly construed fails to state or charge an offense against plaintiff in error? There would be only one possible chance of having the indictment "properly construed" so as to come within the rule of the Feder case (supra) and in an attempt to do this plaintiff in error asks that the reference in the indictment to the "divers other persons" whose true names are to the grand jurors unknown be ignored.

We are confident that no substantial element of the crime has been omitted from the indictment.

In the case of People v. Olcott 2 Johns Cas. (N. Y.) 310, 1 American Decisions 168, cited in the Feder case (supra) it was held that although the union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy, yet one may be convicted after the other accused is

dead before conviction. Wherein is this principle of law different from the situation at bar (assumming the absence of "other persons to the grand jurors unknown"); Gandara is found guilty, as to his co-defendant Esteban Borgaro, Jr., the jury is unable to agree and he is then held subject to a retrial. Later, however, the district attorney dismissed the case against him. Can it be said that the later dismissal of the case against Borgaro operates to release Gandara? The one Federal case just touching this question, but not definitely deciding it, is Miller v. United States (C. C. A. 4th circuit) 277 Federal 721 where the court said on page 726:

> "The last error assigned is the refusal of the court to arrest or suspend judgment, on the ground that conviction of one of two defendants charged with conspiracy could not be the basis of judgment against him while the charge against the other was undisposed of. One of two defendants charged with conspiracy may be separately tried. If one is acquitted, the other must be acquitted also, since he cannot commit the offense alone; and if the charge against one be nol. pros'd the other cannot *afterwards* be convicted, because there is no pending charge against two. State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476; Feder v. U. S., 257 Fed. 694, 696, 168 C. C. A. 644, 5 A. L. R. 370.
>
> "The rule that each of two persons charged with conspiracy may be tried separately negatives the proposition that judgment on the conviciton of one must be arrested until the other is tried. *What would be the effect of a future*

acquittal of Hayes, or a nol. pros. of the indictment as to him, it is not our province at this time to decide."

"Affirmed." (*Italics ours.*)

We, therefore, submit that in any event, regardless of how plaintiff in error construes the indictment that it was good in substance.

Plaintiff in errors final contention is that even if the indictment properly construed did charge the defendant Gandara, with conspiring with divers other persons to the Grand Jurors unknown, that the record will be searched in vain for evidence establishing that there was any conspiracy between plaintiff in error and any Yaqui Indians or with any unknown or unnamed persons.

That is a rather broad and sweeping statement and although we do not wish to burden the Court with again reviewing the evidence in this case, we feel that to fully answer this contention some of the testimony should be noted. We, therefore, respectfully call the Court's attention to the following testimony in this case.

> Taking first the testimony of John Wren (Tr. p 52) where, i nspeaking of conversations he had with Gandara, he said: "He made a statement down at the Border Patrol and went on to tell about furnishing the Yaquis with arms and ammunition, provisions and different things for making the trip into Mexico, said that he was to lead them and *that they intended* to go

on probably a Sunday before that, but something came up with deference to *some of them* being not ready to go* **"

The testimony of Antonio Molino (Tr. p. 54) was as follows:

"The same day that Gandara came there with Chito Valenzuela and *Miguel Mantuma*, he told them to go with him and say that as soon as he got to the river with the rest of the Yaquis, that he would fix everything up down there. He said that if he could fix everything up in a good way with the rest of the Yaquis, that he would come back."

"After Gandara talked, I am awful old man, of the age I have got, I said, I made a remark to the rest of the Yaquis, that don't seem very good to me. He said, 'I don't know.' And then I made the remark that there might be something happen in this affair, and then Chito and Miguel with the matter, and they said, 'You beat me with those words that you said.' "

Certainly this testimony showed that Gandara, Miguel Mantuma and the Yaquis discussed the matter, this evidence was sufficient to go to the jury on the question of Gandara's conspiracy "with other persons unknown" who might have been for example Mantuma, and clearly is sufficient to go to the jury on the question as to whether he might have conspired with some of the Yaquis.

Take the testimony of Jose Gandara himself where he says: Tr. p. 173).

"I got some eight or ten thousand rounds of seven millimeter ammunition. I gave it to the Yaquis, also *with the understanding that they were to hold that ammunition, bury it and hold it until I* told them—Well I was waiting momentarily for a word from friends that I have in El Paso and in Washington, expecting the arms embargo to be lifted. . ."

Again (Tr. p. 175) he said: "I held the Yaquis back here, and that is one of the reasons I had a great deal of trouble, that I did not intend them to send that before then. I did not intend them to leave, that is, with any ammunition that I had furnished, before the embargo was lifted; I asked them *specifically to remain here until we were ready.* I did not explain to the Indians anything about the embargo or what I had in mind, my reason for delaying them. I just told them they should believe me, and I knew better. Their mind is rather small for that. *And because of my request, the Yaquis at this village waited—remained here.*"

And in numerous other places with which we will not burden the Court it is clear that Gandara had an understanding with these Yaquis even to the point of a specific agreement, while the law does not require that there need be a specific agreement proven to authorize a conviction under a charge of conspiracy.

The rule is as stated in "Underhills Criminal Evidence," Section 717, page 953: "It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the as-

conspiring with persons to the grand jurors unknown, if the evidence satisfies the jury, beyond a reasonable doubt, that, although the defendants may not have conspired together, yet if one of them did, in fact, with some third person not named in the indictment, and unknown, to commit the offenses charged, and either one of such persons did any one of the overt acts charged, the defendant who so conspired may be found guilty.' "* * * *.

III

The third contention of plaintiff in error is that "THE THEORY OF THE DEFENSE WAS NOT ONLY IGNORED BY THE TRIAL COURT, BUT IT WAS ENTIRELY REPUDIATED BY INSTRUCTIONS DIRECTLY OPPOSED TO IT."

It is not to be doubted that plaintiff in error had a theory of defense based on the case of Trumbull v. United States, 48 Fed. 99, and it is *possible* that had the facts of the Trumbull case been similar to the case at bar, the refusal of an instruction properly worded and asked for might have been error.

The trial judge has a certain amount of discretion in instructing the jury and if the instructions given fairly state the law on the question, so as to enable the jury to fairly pass on the evidence and to arrive at a fair and just verdict, there can certainly be no objection to the refusal of the trial judge to give a requested instruction, when it does

not correctly state the law, for as said, in the case of Blanton v. United States, 213 Fed. 320:

> "A requested instruction is properly refused unless it ought to have been given in the very terms in which it is proposed. Brooks v. Marbury, 11 Wheat. 78, 6 L. Ed. 423."

We again wish to emphasis the fact that the only exception taken below was the failure of the trial court to give a certain instruction. And plaintiff in error now for the fiirst time raises the question that the trial court should have instructed the jury on the theory of his defense, and we earnestly contend that it is now too late and is improper for plaintiff in error to raise this question.

It is conceded by plaintiff in error in his brief filed in this cause on appeal (page 4) that the court instructed the jury generally on the law of conspiracy and on the neutrality statute, and takes exception merely on the ground of the refusal of the court to instruct on the defendant's theory of the case.

A trial judge having before him all of the evidence in a case, and having heard the testimony of all of the witnesses has undoubtedly the right to instruct the jury generally on the law and refuse an instruction based on a case wherein the facts are so different that an instruction based on the case would be misleading and confusing.

Now taking the requested instruction of the plaintiff in error in the case at bar, upon the refusal of which error is predicated, which counsel for plaintiff in error maintains is based on the Trumbull case which was as follows:

> "The jury are instructed, if prior to the commission of any of the acts charged in the indictment, a revolution or revolt of the Yaqui Indians was in existence in the Republic of Mexico in which armed forces of the said Indians were in conflict with the military forces of the Mexican government, and if members of such armed forces of the Yaqui Indians came to the United States for the purpose of securing munitions of war and provisions, and then returning to rejoin the forces of such Indians in Mexico, and the defendant Gandara furnished ammunition or provisions only for such Indians as had come from Mexico, *and intended* to return to Mexico, and not to recruit or secure other Indians to go to Mexico, then such furnishing of ammunition and provisions would not constitute either a military enterprise or a military expedition as those terms are used in the statute of the United States on which this prosecution is based, and the defendant, Gandara, would not be guilty of beginning, setting on foot, or furnishing means for any military expedition or military enterprise, and a conspiracy merely to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico under the circumstances above mentioned, would not be an offense against the United States." * * * *.

Now before interpreting that instruction where-

in does the Trumbull case (supra) support the instruction so as to entitle the plaintiff in error to have it given in the case at bar. Judge Ross in his opinion says:

> "* * * * 'The very terms of that statute imply that the military expeditions or enterprises thereby prohibited are such as originate within the limits of the United States and are to be carried on from this country. 'Every person who, within the limits or jurisdiction of the United States, begins or sets on foot or provides or prepares the means for any military expedition or enterprise to be carried on from thence, —That is to say, from the United States,—is the language of the statute. If the evidence shows that in this case there ever was any military expedition begun or set on foot or provided or prepared for within the sense of this statute, it was begun, set on foot, provided and prepared for in Chile and was to be carried on from Chile and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States to take on board arms and ammunition purchased in this country and carry them back to Chile, is not the beginning, setting on foot, providing or preparing the means for any military expedition or enterprise within the meaning of Section 5286 of the Revised Statutes.' " * * * *.

Analyzing this opinion, and keeping in mind the fact that Judge Ross had directed a verdict, we find the case holding as follows:

1. That the military expeditions or enterprises prohibited by the statute are such as originate with-

in the limits of the United States and are carried on from the United States.

2. That from the *evidence* in the Trumbull case it is his opinion (based on a motion for a directed verdict) that if there was any military expedition at all, it was begun or set on foot, or provided or prepared for in Chile and was to be carried on from Chile.

3. Also that in his opinion (from the evidence heard by him) that the sending of the Itata to the United States to take on arms and ammunition purchased here was not a violation of the neutrality statute.

The district judge in the case at bar charged the jury in part as follows:

> "The beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise *must be within the territory or jurisdiction of the United States, and to be carried on from thence*, against the territory or dominion of some foreign state, colony, district, or people, with whom the United States were at peace."

And again the judge instructed the jury as follows:

> "Before a jury can convict, it must be proven to their satisfaction that the expedition or enterprise was in its character military: or, in other words, it must have been shown by com-

petent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some *military service, some attack or invasion* of another people or country, state or colony as a military force."

We earnestly contend that the instruction given by the trial judge gave plaintiff in error the protection of the rule of law announced by Judge Ross in the Trumbull case.

Can it then be said that the facts in the Trumbull case are so similar to the case at bar as to have required the court below to practically say to the jury that if they found that, routed and beaten forces of from 27 to 150 Yaqui Indians came to the United States to re-equip themselves, re-organize themselves and then again invade Mexico and that if Gandara were to equip them, carefully giving arms only to those that had intended to return, that he would not have violated the law?

That is in substance the trend of the requested instruction. The Trumbull case certainly does not support such a rule.

It is useless at this time to review the evidence of the case as the matter has been heretofore submitted to this court. In the opinion rendered by this court Judge Wilbur clearly recognized the distinction between the Trumbull case and the case at bar where in his opinion he says:

"* * * * It is clear that the enterprise or expedition was to be carried on from Tucson, Arizona against the Mexican government for the reason that the Yaqui Indians, in leaving the territory of Mexico ipso facto abandoned their operations against the Mexican government and could only resume them after their return with means to be obtained in the State of Arizona. Their intent to return to that nation for the purpose of further hostilities did not alter the fact that they ceased to exist as a military force upon entering the United States. The expedition, when it entered the United States, was headed in the wrong direction to engage in hostilities in Mexico. The retreating Yaqui Indians were powerless to operate as a military force from Sonora, or from their bases in Mexico, it was only by finding a new source of supplies or a new base that they could become a military expedition. That proposed base was Tucson, Arizona. If and when they secured such means their return as an organized unit constituted a military expedition from our neutral territory within the meaning of the law, regardless of whether or not they intended themselves to attempt to overturn the government of Mexico or join other forces engaged in that effort. * * * *

Then after discussing the Trumbull case he says:

"* * * * We cannot extend the principle of that case to the situation here where the Yaqui Indians who came to this country had exhausted their military power, and had fled from the scene of battle to obtain new means for the resumption of hostilities after their return. To knowingly furnish such means for the express purpose of such enterprise was to equip an ex-

pedition to be operated from our neutral territory. There was no error in refusing the proposed instruction." * * * *

And Judge Dietrich in his opinion recognizes and points out the distinction between the Trumbull case and the case at bar where he says:

"* * * If individual Indians straggled in from Mexico for the purpose of remaining here an indefinite time and procuring ammunition and clothing for themselves with the hope of thereafter returning to Mexico and if defendant thereupon sold to them individually such supplies and did nothing more, it probably would not be contended that he would be guilty of the charge. * * * * The mere fact that a rebellion or revolt had been in progress prior to the alleged misconduct of appellant and that participants therein fled to this country with the hope of some time returning and again engaging in the struggle is not conclusive in defendant's favor. Assuming, as some of the evidence tends to show, that they straggled in either individually or in small groups without organization or leadership expecting at some time in the future, when and if they procured the necessary clothing, arms and ammunition, to return and continue the rebellion, and that appellant, knowing of these conditions and expectations, gave assistance by assembling for them large quantities of ammunition and furnishing them with clothing and other supplies, and by meeting and talking with them encouraged them to keep up the struggle, and assisted them in making preparations to go back for military purposes in a body or in large groups taking with them the military stores he

had enabled them to assemble, he might be held chargeable under the law though no new recruits were enlisted. To use United States territory for such purposes would be within the mischief of the statute; the enterprise would be of a military character, and new although made up of old elements."

Judge Diterich then discusses the proposed instructions showing wherein it was too broad and sweeping to have been given.

The evidence in the case shows conclusively that these Yaquis did straggle in, routed, beaten and wounded. That some were intending to return when and if they were equipped, and that Gandara exhorted them, met with them and was going to lead them in an invasion of Mexico. Gandara's own testimony shows this to be a fact. His only excuse was that he was waiting for the embargo to be lifted.

The Yaquis could not have operated again as a military unit until someone gave them the help and means to re-organize.

IV

The fourth and final contention of plaintiff in error is that "THE INDICTMENT, TAKEN BY ITS FOUR CORNERS, CHARGES PLAINTIFF IN ERROR WITH CONSPIRING TO SET ON FOOT AND PROVIDE THE MEANS FOR A MILITARY EXPEDITION TO BE CARRIED

ON FROM MEXICO AND NOT FROM THE UNITED STATES."

This contention is not argued by plaintiff in error and reference is made to their main brief on this question. The subject matter of this contention has been answered in our discussion of the Trumbull case, upon which their point is based.

In conclusion we respectfully submit that plaintiff in error was afforded a fair trial, that he was tried under a valid indictment, that his rights were fully protected by the trial court and further that the refusal of the trial judge to give the requested instruction based on the Trumbull case was proper when taken in light of the undisputed testimony in this case.

The petition for rehearing should be denied.

Respectfully submitted,

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